United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

74-2638

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2638

GREENE COUNTY PLANNING BOARD,

Petitioner

v.

FEDERAL POWER COMMISSION,

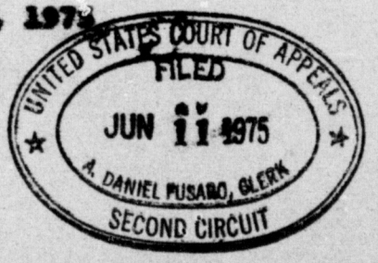
Respondent

POWER AUTHORITY OF THE STATE OF NEW YORK

Intervenor

REPLY BRIEF OF PETITIONER GREENE COUNTY PLANNING BOARD ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

June 9, 1975



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REPLY BRIEF OF PETITIONER GREENE COUNTY PLANNING BOARD

INTRODUCTION

This brief is furnished by Petitioner Greene County Planning Board (the "Planning Board") in reply to briefs from the Respondent Federal Power Commission ("FPC") and Intervenor Power Authority of the State of New York ("PASNY").*

No doubt shaken by the strength of the Planning Board's arguments on the merits of this case, both the FPC and PASNY, in their respective briefs, seek to set up a series of procedural,

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* References to the FPC brief are given "FPC br.___" and to the PASNY brief "PASNY br.___".

jurisdictional barriers to the maintenance of this proceeding in this Court. However, it is perfectly clear (a) that this Court has jurisdiction of this case, (b) that the Planning Board has standing to bring this case to this Court, and (c) that the FPC erred in issuing the orders and permit which are brought here for review in this matter.

I
THE CANADIAN CONNECTION IS A MAJOR FIRST COMPONENT OF A COMPREHENSIVE LONG RANGE INTEGRATED PLAN OF 765 KV TRANSMISSION LINES FROM CANADA TO NEW YORK CITY

As diagrammed on page 6 of the Planning Board's main brief, the Canadian connection is the beginning piece of a state-wide puzzle materially and directly affecting Greene County. The FPC apparently does not dispute the basic validity of that diagram.

On the other hand, PASNY (1) admits its plans to build 765 kv facilities from Canada to Marcy-Edic (PASNY br. 7), (2) admits that the initial decision on the Gilboa-Leeds line requires that it be able to be upgraded to 765 kv (PASNY br. 8-9)* and then makes the totally incredible assertion that:

"There is no present proposal

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* The matter of the Gilboa-Leeds line is still sub judice before the FPC. One of the Planning Board's primary thrusts in this case has been to get the FPC to do an overall review of 765 kv planning, together with related planned power plants, before any segment is finally licensed and constructed.

or plan to construct a
765 line from Marcy-Edic
to Gilboa" (PASNY br. 9).

Not only does this defy logic, but it is also directly contrary to (a) the presentations under oath made by the FPC staff in the proceeding involving the Gilboa-Leeds line, (b) a document which PASNY filed with the FPC on May 3, 1974 and (c) a formal opinion of the New York State Public Service Commission. All three of these sources are cited in the footnote on page 7 of the Planning Board's main brief. No contrary authority is cited by PASNY.

Were this ridiculous assertion of PASNY not qualified in the next sentence of PASNY's brief, that such a line "is one of several possible alternatives" (PASNY br. 9), it would be a bald-faced lie. Not to be overlooked, nonetheless, is that PASNY never disclosed any other alternative in the case involving the Gilboa-Leeds line, in this case, or in any other on-the-record proceeding. The record applicable to this case is not ambiguous -- the diagram on page 6 of the Planning Board's main brief is the present comprehensive, long range, integrated plan.

It is axiomatic that the FPC is a comprehensive planning agency under both the Federal Power Act and the National Environmental Policy Act with duties under both

to look at the whole cheese even when only a piece is offered. It is not disputed that the FPC failed to discharge its comprehensive planning duties in this case. The FPC's response is (a) this Court cannot review this case and (b) in any event, it had no such duties because neither the Federal Power Act nor NEPA applies to the situation here. Both prongs of this forked response are, as discussed below, too blunt to prick.

II

THIS COURT HAS JURISDICTION OF THIS CASE UNDER SECTION 313(b) OF THE FEDERAL POWER ACT BECAUSE THE UNDERLYING PROCEEDING WAS VERY MUCH ONE UNDER SUCH ACT

Much like the person who murdered both his parents and then pled for mercy on the grounds he was an orphan, both the FPC and PASNY make the thoroughly audacious argument that this case should be in the District Court, if anywhere, rather than in this Court because the FPC proceeding from which this case is basically an appeal was not "under" the Federal Power Act ("FPA").

The thrust of this argument is that since an executive order allegedly derived exclusively from the authority of the President as Commander in Chief, and a separate statute (the Energy Supply and Environmental Coordination of 1974 ("ESECA")), provides some basis for the action taken by the FPC, somehow or other this entire case has been ejected from the coverage of the FPA.

Thus, claim the FPC and PASNY, there was no "proceeding under" the FPA which could be brought to this Court as authorized by §313(b) of the FPA. This claim is wholly without merit. There are the following elements in this case, any one of which standing alone would make the proceeding below one "under" the FPA:

A. The proceeding below was conducted by the FPC whose existence and powers come from the FPA.

B. The FPA procedures were followed in the proceeding conducted by the FPC.

C. Executive Order 10485 itself is dependent upon the FPA.

D. The Planning Board requested FPA relief, the denial of which is the basis for this lawsuit.

E. FPC obligations under the FPA are central to the issues in this case.

A. The Proceeding Below Was Conducted by the FPC

The first nexus between the proceeding below and the FPA comes from the fact that such proceeding was conducted by the FPC. The FPC was created by the FPA and functions under it. But for the FPA, the FPC would not exist.

All duties given to the FPC outside of the original FPA must be deemed the result of an amendment to §4 of the FPA, 16 USC 797, since the only way such duties can be carried out is under the other provisions of the FPA establishing the FPC and setting up its structure and procedures.

Viewed in this light, even the National Environmental Policy Act ("NEPA"), 42 USC 4321 et seq., can be seen as amending the authorizing legislation for the FPC, i.e. the FPA, by including certain environmental objectives in its

legislative mandate (S. Rep. No. 91-269, 91st Cong., 1st Sess. (1969), p. 9).

Since the conduct of the FPC in this case -- whether under the FPA, NEPA or an executive order -- cannot be divorced from the FPC's authorizing legislation, this case, as every case before the FPC, is a "proceeding under" the FPA.

B. The FPC Procedures Were Followed In the Proceeding Conducted By the FPC

In its giving of notice, its treatment of intervenors, its promulgation of orders and its procedure on rehearing, the FPC acted in accordance with the FPA. No other basis exists for the procedures the FPC followed.

It cannot be denied that the FPC in the proceeding below treated this case as one "under" the FPA. In every procedural detail, the FPA procedures were followed.

For example, the FPC's public notice (R. 45-6) invited interventions under §1.8 or 1.10 of the FPC's rules, 18 CFR 1.8, 1.10. The only basis for this is §308(a) of the FPA, 16 USC 825 g (a), which permits interventions "In any proceeding before" the FPC.

For further example, the FPC's brief (FPC Br. 3) points out that one of the rulings at issue here is the FPC order denying rehearing (R. 144). The admitted basis for the petition for rehearing is FPA §313(a), 16 U.S.C. 825 l(a). No other

basis exists. Indeed, the "proceeding" which this case specifically brings to this Court for review is the one initiated by the petition for rehearing and terminated by the order denying rehearing. If nothing else, the rehearing proceeding was "under" the FPA and provides this Court with a basis for jurisdiction.*

C. Executive Order 10485 Itself Is Dependent Upon the FPA

The Executive Order refers to §202(e) of the FPA and thereby itself acknowledges the dependence of the Executive Order on the FPA both for creating the Federal agency to which executive duties are delegated and for creating the regulatory context in which such powers can be exercised.*

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*Contrarily, Rettinger v. FTC, 392 F. 2d 454 (2nd Cir. 1968), cited by respondent (FPC Br. p.43) and intervenor (PASNY Br. p.26), does not concern statutory review procedures at all. There, petitioner had failed to file a timely petition for review of an FTC determination. The FTC enabling statute left reopening of the determination entirely discretionary and not reviewable under the statutory scheme. This left that petitioner with only a plenary action under the Administrative Procedure Act, 5 USC 551 et seq, in the Federal District Court. Here both the statutory scheme and the specific procedures followed by the FPC in this case lead into review in this Court. PASNY also tries to say (PASNY Br. 15) that Executive Order 10485 provides for its own procedures and these were the ones followed by the FPC. But one can search the Executive Order and its implementing regulations, 18 CFR 32.50, in vain for the notice, intervention, order promulgation and rehearing procedures followed in this case. They all come instead directly from the FPA.

*The FPC attempts to raise the barrier of §313(b) of the FPA to the maintenance of this case in a different way. The FPC contends (FPC Br. 29-30) that the Planning Board did not raise the §202(e) issue before the FPC upon the petition for rehearing. That is untrue. The petition for rehearing makes clear that the objection to the Commission's order was grounded in the FPC's complete abdication of its responsibilities under the FPA in ruling upon PASNY's application (R. 140).

The Executive Order also describes the assignment of this duty to the FPC as providing a "systematic method" and requires the FPC to make its own public interest finding entirely apart from the views of the Secretaries of State and Defense. Surely, State and Defense were to provide the foreign policy and military input and the FPC was to exercise its own special expertise.

Indeed, until this proceeding called the FPC to task, the FPC did not restrict itself strictly to foreign policy and defense. As the FPC points out (FPC Br. 11) the FPC requested and received economic and engineering data from PASNY (R. 100-101). Furthermore, PASNY's application contained electrical engineering data (R. 5, 9-12, 14-16), as indeed the FPC's regulations implementing Executive Order 10485 require (18 CFR 32.50), as well as "environmental" data (R. 22). The whole direction of the application and processing is evidence that the Executive Order looked to the FPC's FPA responsibility in carrying out this permit duty.

In addition, the very fact that the Planning Board was granted intervention in the Canadian Connection decision, hollow as that grant was, also shows a realization by the FPC that the public interest considerations it had to make under the Executive Order were intimately related to its comprehensive planning responsibilities under the FPA. The Planning Board did not raise the foreign policy and defense aspects of

the Connection. If they were the only measure of the public interest to be determined, intervention should have been denied.

Clearly, the FPC acted in its FPA role in this case, as the Executive Order undoubtedly requires,* while, at the same time, blatantly abdicating its responsibilities under the letter and the spirit of such statute.

D. The Planning Board Requested FPA Relief, The Denial of Which is the Basis for This Lawsuit

The FPC's order which is brought to this Court for review expressly denied the relief under the Federal Power Act requested by the Planning Board. The very question of whether the FPC could exercise such power is reviewable in this Court under §313(b) of the FPA even in cases where the FPC is ultimately held not to have such power under the Act. Chemehuevi Tribe of Indians v. F.P.C., 43 L. Ed. 2d 279 (1975).

In the Chemehuevi case, the U.S. Supreme Court eventually decided that thermal-electric power plants are not subject to FPC licensing authority as alleged by the petitioners. To reach that determination, the court properly took jurisdic-

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*Since ESECA requires the FPC to act "pursuant to" the Executive Order, ESECA relies on the FPA to the same extent the Executive Order does.

tion under §313(b) of the FPA of the very question of whether the FPC had jurisdiction.

In this case the Planning Board seeks to compel the FPC to exercise duties under the FPA -- as in the Chemehuevi case. Here the FPC denies any such duties -- as in the Chemehuevi case. Indeed, the FPC's brief frames the fundamental issue in this case as follows:

> "Whether the Commission properly concluded that the instant proceeding did not involve matters subject to Commission regulation under the Federal Power Act?"(FPC Br. 1)

The very issue of the FPC's jurisdiction is an issue under the FPA. Thus, the proceeding below which specifically dealt with that issue, was a "proceeding under" the FPA within the meaning of §313(b).

E. The FPC's Obligations Under the FPA Are Central to the Issues in This Case

The Planning Board's primary object in the proceeding below was to force the FPA to take an overall look at the long range, comprehensive plans of PASNY rather than deal with PASNY's plans in a segmented, ad hoc, project by project basis. This is not only required by NEPA, but also by the FPA entirely apart from NEPA. Both §10(a) and §202(e) of the FPA are the basis in the FPA for the comprehensive planning duties the Planning Board wanted the FPC to exercise.

The FPC (FPC Br. 26-27) seeks to avoid these duties by (a) arguing that the Canadian Connection is not a "primary line" nor any other part of "project works" to which §10(a) applies and (b) asserting that PASNY is exempt from §202(e) because it is not a "person".*

1. Section 10(a) of the FPA is Applicable

Both the FPC and PASNY miss the point in elaborately explaining that the Canadian Connection is not a "primary line". The Planning Board's §10(a) argument does not claim that it is. The Planning Board does, however, start with its worries over the Gilboa-Leeds line, admittedly a "primary line" to which the FPC's §10(a) duties do apply.

Because of the interrelationships between the segments of the Canada to New York City 765 kv trasmission system, to adequately discharge its §10(a) duties on any segment to which such duties apply, the FPC must look at the whole ball of wax. By reviewing the Canadian Connection in a vacuum in the proceeding below, the FPC is violating the §10(a) duties which it has in Project 2685 including the Gilboa-Leeds line and in Project 2729

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* As pointed out above (p.10) these issues arise "under" the FPA and are reviewable in this Court under §313(b) of the FPA even if the Planning Board is completely wrong.

In a very meaningful sense the FPC's comprehensive planning duties under §10(a) of the FPA are involved in this case.

2. Section 202(e) Applies To PASNY and To The Canadian Connection

Both the FPC and PASNY argue that PASNY is exempt from §202(e) of the Federal Power Act under a reading of the definitional sections of the Federal Power Act which appear to define "person" in such a way as to exclude PASNY.

However, this "definitional problem" has been definitively resolved by the U.S. Supreme Court in United States vs. Public Utilities Commission of California, 345 U.S. 295 (1953). That case involved the meaning of "person" in §201(d) of the Federal Power Act; 16 USC 824(d). It was there argued that the Federal Power Commission could not regulate the sale of electricity to a county in California because the county was not a "person" in the meaning of the Federal Power Act. As support for that assertion, the same sections of the Federal Power Act, namely §§ 201(f), 3(3), 3(4) and 3(7), were used as are asserted in this case. The Supreme Court completely rejected this attempt to find an indirect exemption for municipalities in Part II of the Federal Power Act stating:

> "The use of these Sections in support of an indirect exception to Part II has no support in the statutory scheme as a whole." 345 U.S. at 312

The Supreme Court went on to say:

> "We conclude, therefore, that the Congress attached no significance of substance to the addition of the word 'person' and in fact did not intend it as a limitation on Commission jurisdiction." 345 U.S. at 313

It is perfectly clear, therefore, that the use of the word "person" in §202(e) of the Federal Power Act, as in other portions of Part II and Part III of the Federal Power Act, was not intended to set up an exclusion for "municipalities" generally.

In this connection, it is interesting to note that while PASNY asserts a general exemption from Part II of the Federal Power Act (PASNY Br. 21-24), the FPC is much less willing to agree to a complete exemption. Thus the FPC brief states:

> "We hasten to add that such Sections do not bar the application of the provisions of Parts II and III of the Act to state owned electric systems in all circumstances." (FPC Br. 32)

The FPC elsewhere says:

> "Other Sections of Parts II and III of the Federal Power Act do apply to publically owned or cooperatively owned systems. See, for example, the wartime or energy power supply provisions of §202(e) the accounting and depreciation provisions of §303, and the general information gathering and report jurisdiction of §311 thereof." (FPC Br. 31).

It is hard to imagine any aspect of electric energy regulation which it is more appropriate to regulate at the

Federal level than the exportation of electric energy from the United States to a foreign country. That is precisely the activity governed by §202(e) and there is no reason why a State agency should be any less subject to regulation on this score than a private electric company.

Since §202(e) is applicable to PASNY, the proceeding below was directly "under" the Federal Power Act and this Court has jurisdiction to hear this case. In addition, since neither PASNY nor the FPC has complied with §202(e), the permit and order brought to this Court for review are erroneous and, as argued at length in our main brief, must be set aside.

3. The FPA Judicial Review Provisions Apply In This Case Even If the Executive Order and ESECA Do Not Necessarily Rely on the FPA

When passing on electrical interconnections which are related to hydroelectric projects, because of the FPC's comprehensive planning responsibilities, the FPC has duties which come directly from §10(a) of the FPA. Nothing in either Executive Order 10485 or ESECA strip away those duties. Indeed, as we have taken pains to point out, the Executive Order, ESECA and the FPA all fit together. But even if, arguendo, the Executive Order and ESECA are seen to be independent of the FPA, this Court still has jurisdiction to hear this case under §313(b) of the FPA because this case unavoidably includes issues under the FPA and §313(b) is the exclusive method which can be used to review these issues.

The issue of judicial review in such circumstances has recently been decided to be resolved in favor of the Court of Appeals having jurisdiction, Connecticut Municipal Group v. F.P.C., 498 F. 2d 993 (D.C. Cir. 1974) and Municipal Electric Utility Association of Alabama v. F.P.C., 485 F. 2d 967 (D.C. Cir. 1973). These cases involved questions under the Economic Stabilization Act, which provided its own exclusive method of judicial review, and the FPA. The existence of FPA questions was held to be a sufficient basis for direct Court of Appeals review jurisdiction. A fortiori since neither Executive Order 10485 nor ESECA provide for a special method of statutory review, §313(b) of the FPA should govern review in this case.*

In cases other than the unique ones arising jointly under the FPA and ESA, Federal Power Commission determinations have been assumed by the Courts to be subsumed in the exclusive review process of §313(b) of the FPA.

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*It has been convincingly argued that, in some instances of substantive bifurcation, there is no significant reason to divide review of an agency's actions between statutory and non-statutory forums, particularly since omissions from special review statutes are often no more than legislative oversight. "Note: Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals," 88 Harvard Law Rev. 980, 993 (1975). Certainly whatever substantive bifurcation exists in this case, there is only one possible disposition of the matter - to order the FPC to make required determinations under required procedures or to allow its permit to stand. Divided review will only further burden the courts and further obstruct a necessary coherent, comprehensive review of the decision at issue.

> "...Congress in §313(b) prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders." Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336-7 (1958).

There is no logical reason for Congress to have excepted the Canadian Connection determination from the review it explicitly created for the specialized matters involving the national power systems.

It has been pointed out that there is often no purpose served by the limited language of a special review statute and often results only from poor draftsmanship. L. Jaffe, Judicial Control of Administrative Action, 158-9, 420-2, cited in 88 Harvard L. Rev., supra, at 984. The basic purpose in enacting a special review provision must be looked at in determining its intended breadth.

It follows then that, even if the Executive Order and ESECA are independent of the FPA, this court is the proper forum to hear this case under §313(b) of the FPA because FPA issues are also raised by the Planning Board.

III
THE FPC TOTALLY ABDICATED ITS DUTY TO BE AN OPEN, ACTIVE AND AFFIRMATIVE PROTECTOR OF THE PUBLIC INTEREST

It matters little whether the applicable law is Section 10(a) of FPA, NEPA, Section 7(d) of ESECA, Executive Order 10485 or Section 202(e) of the FPA, or any combination of them. All require the conduct of an inquiry, the compilation of a record and a consideration of all relevant factors -- each of which is absent in this case.

The Planning Board's main brief at pages 29-34 catalogues the total failure of the FPC to be more than a passive bystander in the proceeding below.

Both the FPC and PASNY argue that the public interest standard in this case is met by the expression of Congress in ESECA and the "sign offs" from the Departments of State and Defense. This argument is born of necessity since there is little else in the record of this case to support the FPC's decision.

Both the FPC and PASNY attempt to justify its conduct with a "public interest" standard that leaves no real determination for the FPC to make. Were the context of "public interest" so circumscribed, crucial concerns of the public would be continually thwarted. The standard proclaimed by the FPC and

PASNY apparently would allow any decision with defense or foreign policy aspects to be made without regard to other ramifications of the decision, even if they posed the likelihood of drastic harm to a large population. Surely, neither Congress nor the President intended such a result.

As extensively discussed in petitioner's main brief, no reasoned contextual analysis of ESECA supports the view that it sought to exempt the contested connection from all environmental considerations or from all electric engineering concerns. ESECA is couched in terms of reconciling environmental concerns with pressing energy needs. The House report relied upon so heavily by both the FPC and PASNY declares in regard to ESECA's exemptions from environmental requirements, that only "carefully limited adjustments" would be made (emphasis added). House Report No. 93-1013, 2 U.S. Congressional and Administrative News 74, p. 3283.

Furthermore, while PASNY and FPC note superficial similarities between the ESECA exemptions for the Canadian Connection and the Trans-Alaska Pipeline Authorizations Act exemption from all of NEPA, they fail to point out the more telling difference. TAPA was enacted only after extensive consideration of the environmental ramifications of the Trans-Alaska Pipeline had occurred. No such consideration has been

made of the proposed Canadian Connection. In fact, there has been no inquiry and no compilation of a record. Additionally, it is axiomatic that where language in legislation differs, its intent may well differ as well.

There just is no support for the narrow "public interest" standard suggested by the FPC and PASNY. The correct standard is the usual one under both the FPA and NEPA, requiring the full range of procedures and considerations described in the Planning Board's main brief and discussed by this Court in Scenic Hudson Preservation Conference v. FPC, 354 F. 2d 608 (2d Cir. 1965) cert. den. 384 U.S. 941 (1966), Hanly v. Mitchell, 460 F. 2d 640 (2d Cir. 1972) cert. den. 409 U.S. 990 (1972) and Hanly v. Kleindienst, 471 F. 2d 823 (2d Cir. 1972) cert. den. 412 U.S. 908 (1973).

Since both the standard used by the FPC and its manner of applying it were incorrect, the FPC's decision was necessarily in error.

CONCLUSION

The Canadian Connection cannot be treated either as a facility too minor in effect to warrant comprehensive FPC attention or so major as to be a part of American foreign policy entitled to escape the normal processes of law. The FPC and PASNY argue it was one or the other. In so doing they seek to perpetuate the errors of the proceeding below. The case should be remanded to the FPC for proceedings in accordance with NEPA and the FPA.

June 9, 1975

Respectfully submitted

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UNITED STATES COURT OF APPEALS
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Greene County Planning Board, Petitioner	)	
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Federal Power Commissioner, Respondent	)	No. 74-2638
Power Authority of the State of New York, Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the Petitioner's reply brief by mailing two copies thereof to each of the following counsel at the addresses below:

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Re: Greene County Planning Board v. F.P.C.
#74-2638

Dear Sir:

Enclosed are 25 copies of Petitioner's reply brief, a certificate of service and final appendix designations.

Very truly yours,

Robert J. Kafin

Robert J. Kafin

RJK:wlb
enclosures
cc: Scott B. Lilly, Esq.
Drexel D. Journey, Esq.

74-2638

FINAL APPENDIX DESIGNATIONS

The Appendix will contain the entire Record except for pages 13-44. The Appendix pagination will be the same as the Record pagination. A note will be inserted stating that pages 13-44 are intentionally omitted.

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